Tan Sri Dato Paduka (Dr) Ting Pek Khing v Hii Chang Pee @ Hu Chang Pee

HIGH COURT (MIRI) — SUIT NO 22–43 OF 1998(MR)
SULAIMAN DAUD J
28 FEBRUARY 2003

Civil Procedure *— Pleadings — Amendment of — Counterclaim for damages in libel — Whether the proposed amendment will change the suit from one character into a suit of another and inconsistent character — Whether the proposed amendment will cause prejudice to the plaintiff which cannot be compensated with costs*

In this action, the plaintiff sued the defendant for libel. The defendant on the other hand, counterclaimed against the plaintiff for damages in respect of an alleged libel published by the plaintiff to the police in a written report, and in a press release that was also subsequently published in several newspaper. In his affidavit in support, the defendant averred that in consequence of the said police report lodged by the plaintiff or his agent against him, he was arrested by the police following which a police statement was recorded from him and his fingerprint and photograph taken. He further averred that he was formally charged under s 211 of the Penal Code but on the date of the trial the deputy public prosecutor withdrew the charge against him. For the reason aforesaid, the defendant asserted that he have suffered additional hurt, embarrassment and distress. The defendant now seeks to amend his amended defence and counterclaim to add new paragraphs thereto to plead the facts relating to his arrest and charge. This was the defendant's appeal against the decision of the learned deputy registrar dismissing the defendant's application for an order that leave be granted to the defendant to amend the amended defence and counterclaim.

Held, dismissing the appeal:

(1) The amendment if allowed would have the effect of adding the tort of malicious prosecution against non-parties to the defamatory suit between the plaintiff and the defendant. All the matters pleaded in the proposed new paragraphs relate to the act or conduct of persons in authority over whom the plaintiff has no influence or control. The police in arresting, detaining and recording the defendant's statement is in fact exercising their statutory power under the Criminal Procedure Code. The power of prosecution and the withdrawal of charges are vested in the public prosecutor and the person appointed by him to be the deputy public prosecutor. Such an amendment, if allowed would transcend into 'wide ranging investigation akin to public inquiries' into the conduct of public officers which is not necessary to determine the real issues between the party (see pp 383G–384B).

(2) It was not opened to the plaintiff to question the act and conduct of such public officers in the course of carrying out their statutory functions in his defence to the counterclaim for to do so would tantamount to an inquiry into their conduct. It was also not opened for the plaintiff to make such public officers third party to the proceeding for any indemnity and contribution arising from their act, as the plaintiff clearly has no cause of action against them. The proposed amendment would cause prejudice to the plaintiff which cannot be compensated with costs (see 384E–G).

[Bahasa Malaysia summary

Dalam tindakan ini, plaintif telah menyaman defendan untuk libel. Defendan sebaliknya, telah menuntut balas terhadap plaintif untuk ganti rugi berhubung libel yang dikatakan telah diterbitkan oleh plaintiff kepada polis dalam satu laporan polis, dan dalam satu kenyataan akhbar yang juga telah diterbitkan kemudiannya dalam beberapa surat khabar. Dalam afidavit sokongan beliau, defendan telah menegaskan bahawa akibat daripada laporan polis yang dikatakan telah dibuat oleh plaintif atau ejen beliau terhadapnya, beliau telah ditangkap oleh pihak polis dan berikutan itu satu pernyataan polis telah direkodkan dari beliau dan cap jari dan gambar beliau telah diambil. Beliau seterusnya menegaskan bahawa beliau telah dituduh dengan rasminya di bawah s 211 Kanun Keseksaan tetapi pada tarikh perbicaraan timbalan pendakwa raya telah menarik balik pertuduhan terhadap beliau. Berdasarkan sebab yang dinyatakan, defendan menegaskan bahawa beliau telah mengalami sakit hati, rasa malu dan penderitaan yang amat sangat. Defendan sekarang memohon untuk meminda pembelaan dan tuntutan balas beliau untuk menambah perenggan-perenggan baru untuk memplidkan fakta-fakta berhubung tangkapan dan pertuduhan beliau. Ini merupakan rayuan defendan terhadap keputusan timbalan pendaftar yang bijaksana dalam menolak permohonan defendan untuk satu perintah untuk membenarkan defendan meminda pindaan pembelaan dan tuntutan balas.

Diputuskan, menolak rayuan tersebut:

(1) Pindaan tersebut jika dibenarkan akan menyebabkan bertambahnya tort pendakwaan berniat jahat terhadap mereka yang bukan merupakan pihak-pihak dalam guaman fitnah antara plaintiff dan defendan. Kesemua perkara yang diplidkan dalam cadangan baru perenggan-perenggan tersebut mempunyai kaitan dengan tindakan atau perbuatan pihak berkuasa yang mana plaintif tidak mempunyai pengaruh atau kawalan ke atasnya. Pihak polis apabila membuat tangkapan, penahanan dan merekodkan pernyataan defendan pada hakikatnya sedang

melaksanakan kuasa statutori mereka di bawah Kanun Acara Jenayah. Kuasa pendakwaan dan penarikan balik pertuduhan diberikan kepada pendakwa raya dan orang yang dilantik oleh beliau untuk menjadi timbalan pendakwa raya. Suatu pindaan, jika dibenarkan akan menjangkaui 'wide ranging investigation akin to public inquiries' ke atas perbuatan pegawai-pegawai awam di mana tidak perlu ditentukan isu-isu sebenar antara pihak tersebut (lihat ms 383G–384B).

(2) Ia tidak terbuka untuk plaintif menyoal tindakan dan perbuatan pegawai-pegawai awam dalam menjalankan tugas-tugas statutori mereka dalam pembelaan beliau terhadap tuntutan balas tersebut kerana dengan berbuat demikian akan sama seperti membuat siasatan ke atas perbuatan mereka. Ia juga tidak terbuka untuk plaintif membuat pegawai-pegawai awam tersebut pihak ketiga kepada prosiding untuk apa-apa indemniti dan sumbangan yang timbul dari tindakan mereka, kerana plaintif dengan jelas tiada kausa tindakan terhadap mereka. Pindaan yang dicadangkan adakan menyebabkan prejudis yang tidak boleh dibayar balik dengan kos (lihat ms 384E–G).]

Notes

For cases on amendment of pleadings, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4386–4423.

Cases referred to

Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
McCarey v Associated Newspapers Ltd & Ors (No 2) [1965] 2 QB 86 (refd)
Quinn v Leatharn [1900–3] All ER Rep 1 (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 21 (refd)

Legislation referred to

Criminal Procedure Code
Federal Constitution art 145
Penal Code s 211
Rules of the High Court 1980 O 20 r 5(1)

Dato' VK Lingam (*Victor Wong* with him) (*Victor Wong & Chiew*) for the plaintiff.

Karpal Singh (*Fabian Lim, Orlando Chua* and *Lim Heng Choo* with him) (*Lim & Lim*) for the defendant.

Sulaiman Daud J: This is the defendant's appeal to the judge in chambers against the decision of the learned deputy registrar dismissing the

A defendant's application dated 30 August 2001 for an order that leave be granted to the defendant to amend the amended defence and counterclaim.

The defendant filed in three affidavits, namely the affidavit-in-support affirmed by him on 2 August 2001 and two affidavits in reply affirmed on 7 September 2001 and 15 November 2001. The plaintiff affirmed two B affidavits in reply affirmed on 21 August 2001 and on 6 November 2001.

The relevant facts for the purpose of this application may be stated as follows. In this action, the plaintiff sued the defendant for libel published by the defendant in a police report lodged at the Miri Central Police Station, and for libel contained in a press release circulated by the defendant that C was subsequently published in several newspapers.

The plaintiff averred that the sting of the libel is that he had dishonestly misappropriated the sum of RM200,000 for himself by paying a cheque for that amount, which the defendant had given him to pass on as a donation to Masjid Lingga, into his own bank account with the intention of permanently depriving Masjid Lingga and the defendant of the proceeds, D and that he was guilty of criminal breach of trust and/or the criminal offence of cheating.

The defendant on the other hand, counterclaims against the plaintiff for damages in respect of an alleged libel published by the plaintiff to the police in a written report on 20 April 1998, and in a press release on or about E 20 April 1998 which was also subsequently published in several newspaper. The defendant in his counterclaim averred that such publication in their natural and ordinary meaning meant and were understood to mean that he had maliciously filed a police report against the plaintiff, and that he had lied in maintaining that he did not know that the plaintiff held back the cheque while awaiting further instruction from YAB Chief Minister to F forward the payment.

In his affidavit in support, the defendant averred that in consequence of the said police report lodged by the plaintiff or his agent against him, he was arrested by the police on 23 September 2000 following which a police statement was recorded from him and his fingerprint and photograph taken. G He further averred that on 29 September 2000, he was formally charged under s 211 of the Penal Code but on the date of the trial on 8 May 2001, the charge against him was withdrawn by the deputy public prosecutor. For the reason aforesaid, the defendant asserted that he have suffered additional hurt, embarrassment and distress.

H The defendant now seeks to amend his amended defence and counterclaim to add a new para 35 thereto to plead the fact relating to his arrest and charge. Mr Karpal Singh, for the defendant, submitted there was no necessity for the plaintiff to lodge the said police report to allege that the defendant had lodged a fake report. The learned counsel argued that the only purpose for lodging such report is for the police to act and that the I police did act on it.

It is also the learned counsel's contention that the intended consequence of the plaintiff's police report against the defendant can never

be too remote and that the defendant is entitled in law to claim for damages for such arrest. The learned counsel cited the case of *Quinn v Leatharn* [1900–3] All ER Rep 1 where Lord Lindley said at p 17 that:

> ... the intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damages.

Further, the learned counsel drew the court's attention that in the proposed amendment, the defendant limits his reliance on his arrest and charge and to injury to feelings and does not additionally rely on injury to reputation, as he clearly could if he had brought a claim against the plaintiff for malicious prosecution. In support, the learned counsel referred to *McGregor on Damages* (16th Ed) at para 1862 which read:

> The principal head of damage here is to the fair fame of the plaintiff, the injury to his reputation. In addition it would seem that he will recover for the injury to his feelings, ie for the indignity, humiliation and disgrace caused him by the fact of the charge being preferred against him.

Mr Karpal Singh also submitted that the defendant's application for amendment should be allowed as it comes within the principle stated in *Yamaha*'s case. The applications for amendment arise out of the same facts and issues or substantially the same issues as pleaded in the plaintiff's claim, and that the defendant's application is in consequence of the plaintiff's action in lodging the police report against the defendant.

Dato' VK Lingam, for the plaintiff, firstly contends that plaintiff did not carry out any of the act sought to be pleaded by the defendant in the proposed amendment as the plaintiff have no control on the police investigation and over the action of the deputy public prosecutor. On this point, the court was referred to art 145 of the Federal Constitution, and the case of *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 and *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50.

In answer to the defendant's counsel contention that the defendant's limit his reliance to injury to feelings, the plaintiff's counsel pointed out that the passage in *McGregor on Damages* referred to by the defendant's counsel is in fact under the heading 'Malicious Criminal Prosecution' in the said text, which is distinct from the suit of defamation. According to the learned counsel, if the proposed amendment is allowed, it will alter the character of the suit by the addition of the tort of malicious prosecution against non-parties.

Further, the learned counsel submitted that in law of libel damages covers injury to his reputation and hurt to his feelings. The court was referred to *Halsbury's Law of England* (4th Ed) at para 248 and the case of *McCarey v Associated Newspapers Ltd & Ors (No 2)* [1965] 2 QB 86. By reason thereof, it is submitted that it is not possible for the additional hurt sought to be pleaded in the proposed amendment to be broken up.

Having briefly stated the factual background and highlighted the submission of both the learned counsels, I now turn to consider the merit of the present application.

A Amendment of writ and pleadings with leave of court is governed by O 20 r 5 of the Rules of the High Court 1980 ('the RHC') where under r 5(1), it is expressly provided that subject to this rule, the court may at any stage of the proceedings allow any party to amend his pleadings in such manner (if any) as it may direct. The principle of law on amendment has been well established in the Federal Court case of *Yamaha Motor Co Ltd v* B *Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 where Mohamad Azmi FJ stated as follows (at pp 214–215):

> Under O 20 of the Rules of the High Court 1980, which is equivalent to O 28 Rules of the Supreme Court, a judge has discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially C (see *Kam Hoy Trading v Kam Fatt Tin Mines* [1963] MLJ 248). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic question should be considered to determine whether injustice would or would not result: (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments would not in D effect turn the suit from one character into a suit of another and inconsistent character (see *Mallal's Supreme Court Practice* at p 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as the E cause of action in respect of which relief has already been claimed in the original statement of claim.

Before I turn to consider the present application based on the rule slated in *Yamaha*, I will first consider the issue of delay as raised by the plaintiff in his second affidavit in reply. Having examined the chronology of event, I am satisfied that there is no inordinate delay on the part of the defendant in F making the present application. I agree with the learned defendant's counsel that there is only an interval of about three months from the date of the disposal of the said charge on 8 May 2001 and the filing of the present application on 3 August 2001.

I will next consider the plaintiff's main objection to the application, that G the amendment if allowed would have the effect of adding the tort of malicious prosecution against non-parties to the defamatory suit between the plaintiff and the defendant. After having examined the clear terms of the proposed amendment, I am inclined to agree with the plaintiff's counsel on this issue. All the matters pleaded in the proposed new paras 33.1 to 33.5 H relate to the act or conduct of persons in authority over whom the plaintiff has no influence or control. The police in arresting, detaining and recording the defendant's statement is in fact exercising their statutory power under the Criminal Procedure Code. It is also not disputed that the power of prosecution and the withdrawal of charges are vested in the public prosecutor and the person appointed by him to be the deputy public I prosecutor.

It also appears to me that additional hurt, embarrassment and distress complained of is not the intended consequence of the publication by the

plaintiff of the police report. On the contrary, it is obvious that such additional injury to the defendant's feelings, if at all can be separated from the injury already suffered from the alleged publication, arose from the act of persons acting lawfully under the law of the land for the time being in force relating to criminal proceedings. Such an amendment, if allowed will also in my opinion transcend into, to borrow the words of May LJ in *McPhilemy*'s case, 'wide ranging investigation akin to public inquiries' into the conduct of public officers which is not necessary to determine the real issues between the party.

Further, it is also to be noted that the defendant counterclaim against the plaintiff is in respect of damages for libel and the act or matter averred in the proposed amendment is not in any way related to libel action. It arose from the cause of action of malicious prosecution.

In coming to the above conclusion, I am not unmindful that the arrest of the defendant and the subsequent charge against him may have been triggered by the publication by the plaintiff of the police report but here we are not concerned with such causation. What matters is whether the proposed amendment will change the suit from one character into a suit of another and inconsistent character. For the reason stated above, my answer to that question is definitely in the positive.

The next relevant issue is whether the proposed amendment will cause prejudice to the plaintiff which cannot be compensated with costs. With due respect, I cannot accept the defendant's contention that the same will cause no injustice or prejudice to the plaintiff. As I have stated earlier that the proposed amendment relate to the act and conduct of public officers over whom the plaintiff has no control. However, the proposed amendment seeks to make the plaintiff accountable for their act and conduct. It is also not opened to the plaintiff to question the act and conduct of such public officers in the course of carrying out their statutory functions in his defence to the counterclaim for to do so would tantamount to an inquiry into their conduct. It is also not opened for the plaintiff to make such public officers third party to the proceeding for any indemnity and contribution arising from their act as the plaintiff clearly has no cause of action against them. I thereof hold that the proposed amendment will cause prejudice to the plaintiff which cannot be compensated with costs.

I dismiss the appeal on these two grounds alone without the need to consider the further issue of bona fide. I also make an award of costs to the plaintiff to be taxed unless otherwise agreed.

Appeal dismissed.

Reported by Peter Ling